

Vrouwenmishandeling, strafrechtelijk afgedaan? : strafrechtelijke regulering van mannelijk geweld tegen vrouwen in de privésfeer

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Summary

Since the Eighties the issue of domestic violence has become more and more a legal issue: the woman is a legal subject and has freedom rights which must be respected within the home as well as outside. Violence against the woman by her partner or ex-partner constitutes a breach of her physical integrity and personal privacy. The question is how to provide sufficient security to allow women to exercise their freedom rights within or without the home. Respect for privacy is usually considered a passive right: non-intervention by the state. Violence against women in the home is individualized and reduced to a man-woman relationship where issues of power aren't recognized as relevant. Male battering of women is perceived as a private problem for which society has no responsibility. Respect for the privacy means in that case protecting the privileges and prerogatives of battering man and failing to protect the battered women: not the privacy of the home but the privacy of the man is respected. On the other hand the concept of privacy may also be interpreted as a right to freedom, as an affirmative concept of liberty. Privacy is an important prerequisite for the development of self-respect, self-expression and self-assurance, in other words to ensure some degree of autonomy. It is women's right to take their own decisions. If privacy is interpreted as an active right, state intervention to protect the woman battered by her partner becomes a necessary precondition for the woman to be able to exercise her freedom rights.

The question now is how to provide the security which will allow women to exercise their rights to freedom. Within the framework of this study that question is limited to criminal law, and especially the role of the Public Prosecutions Department in these matters: How may the Public Prosecutions Department enhance the legal protection of victims of violence by their partner or ex-partner? This legal protection covers three aspects: protection against abuse of power by the administration, protection against breaches of personal freedom rights by other citizens and protection by openness to social contexts within the closed legal system (this is called legal protection in a relational sense). Because of the public and punitive nature of criminal law its capacity for individual legal protection is limited. At the same time this public and punitive aspect may be used as a means to pressurize the man into accepting responsibility for the violence committed. Adequate legal protection means that both the victim and the suspect are treated as legal subjects. The man is treated as a human being responsible for his own behaviour and capable of dealing with guilt if he is treated with respect. He is held responsible for forsaking his duties and has as such a right to proper treatment by the administra-

tion. The victim is treated as a legal subject in that her right to physical integrity and privacy within the relationship is recognized and she is informed of her rights and duties as the injured party or witness to a criminal law case. This requires a humane approach aimed at restoring the peace and more specifically aimed at preventing recidivism for there is a substantial chance of recurrence of battering the women. This is where the victim of wife abuse differs from the many other victims who do not run the risk of again becoming the victim of violence by the same perpetrator.

The Role of the Public Prosecutions Department

The way in which the Public Prosecutions Department avails itself of its prosecuting competences has been researched by means of an exploratory study into the way in which women abuse cases are dealt with by the Department. The results of this study indicate that complaints of wife abuse are a regular item with the district courts. In 1985 the average sized court of Breda registered 2 instances of wife abuse per week on average, the smaller court of Assen one to two cases per fortnight and the court of Rotterdam about one case a day. Most women abuse cases are within the category of (simple) assault followed by the category of vandalism. These are so-called frequent, non-serious offences. Women abuse cases in the assault category are treated like other cases of assault, and women abuse cases in the vandalism category are prosecuted more often than other instances of vandalism. The expectation that women abuse cases are dismissed more often than other cases of abuse has not been confirmed by this research. The same holds true for the way in which the serious offences of rape and murder/manslaughter are dealt with.

These general statistics hide a vast variation in cases of wife abuse: a variation in seriousness and duration of the violence, the nature of the offences committed as well as a variation in duration and nature of the relationships. With all this variation what draws the attention is that most cases of wife abuse presented to the Public Prosecutions Department concern instances of violence by ex-partners. And, furthermore, it are mostly men from lower social strata, one in two of whom are also without paid work, that come into contact with the prosecutor. This means that the cases that are presented to the Public Prosecutions Department are no reflection of the social reality that one in every eight women, from all social strata, is confronted with unilateral violence from her partner.

Considering the various factors that influence a prosecutor's decision whether to prosecute or to dismiss, we find that general aspects such as alcohol abuse and recidivism increase the chance of prosecution. As regards factors which specifically concern male battering of women one may say that prosecutors make no difference between cases of violence by the ex-partner and violence within a relationship. However, the chance that the prosecutor opts for prosecution increases if the woman

ends her relationship with the man after filing the complaint. In case the woman informs the public prosecutor in writing that she does not want prosecution, there is a big chance that the case is dismissed. There is no obvious difference between the ways in which cases of incidental violence and cases of repeated violence are dealt with. A reason for this phenomenon may be that repeated violence is interpreted as mutual violence: both partners let it get this far, both are responsible for the violence. Further aspects taken into account when deciding whether to prosecute or not include the seriousness of the injuries, the extent of the damage, whether damages are paid voluntarily, as well as the general attitude of the suspect.

The reason why domestic violence is dealt with in the same way as any other form of violence is the fact that the specific problems related to wife abuse are not acknowledged: the issue of power within a relationship, the chronic violence, the increased isolation of the woman, the reduced resilience of the woman due to the dominating and violent behaviour of the man, and, finally, the specific traumatization. Nor is violence by the ex-partner recognized as seriously privacy-invading behaviour, although such cases tend to get prosecuted more often. This privacy-invading behaviour, also known as 'separation assault', can be highly threatening for the woman or even lethal.

A number of stereotype ideas may be the reason why this specific issue is not recognized for what it is. One such widespread idea is that the woman should leave her partner if he is violent. This opinion completely disregards the complex emotional and social dependency and issues of power within a relationship. It furthermore ignores the fact that especially in the period immediately after the woman has left, during the separation process, the chance of (serious) violence is largest. Another idea, related to the first, is that the woman too is to blame in case of repeated violence: she let it come this far (by not leaving). The argument that police intervention will lead to escalation of the situation is used to avoid judicial intervention in existing relationships. But even if the woman has left the man, this argument may still be used. Assuming a relationship between man and woman as a relationship of equality in which emotions may run high and where both take an equal share in the escalation of conflicts, underrates the power struggle within (marital) relationships. This idea of equality may prevent recognition of the man's dominating and violent behaviour, even in case the woman tries to escape from the man's power. If the man pursues the woman, for instance, this may be interpreted as a process of attraction and rejection. These ideas of course play a certain role but they need not necessarily result in non-punitive reactions by the public prosecutors. However, these opinions are, among other things, the reason why the seriousness of domestic violence and the chance of recidivism is not (always) adequately understood. The fact that domestic violence against women is dealt with like any other instance of violence indicates that in case of less serious offences such as simple assault, vandalism and trespassing the chance of standardized procedures being applied is significant, whether the case is settled out of court or by the

judiciary. Even in case of more serious offences such as grievous bodily harm, attempted manslaughter or rape the specificity of battered women seems to go (usually) unnoticed so that there is no official approach especially aimed at preventing recidivism. The Public Prosecutions Department's attitude is insufficient from the point of view of legal protection for the victim of wife abuse.

Legal Protection for Victims of Wife Abuse

In order to provide legal protection it is necessary to include the specific interests of victims of wife abuse in the final decision-making, both as regards the procedures and sentencing. This may be done by choosing a humane approach. Current criminal law remedies allow for such an approach. In order to stimulate this humane approach certain formalization via directives and protocols is needed, not to achieve bureaucratic formal equality but to provide the police and the Public Prosecutions Department with the means to adopt an approach which duly recognizes the specific issues involved in male domestic violence against women. Establishing a cooperative body on Domestic Violence at district court level, in which police, judiciary, social workers, probation officers, victims aid organizations, barristers and solicitors get together and discuss the issues and individual cases, seems an important precondition to achieve adequate understanding of the seriousness of the violence and to better attune the various approaches. The Public Prosecutions Department may take the initiative in this matter or perhaps the police, being the first link in the criminal procedure chain to be confronted with domestic violence against women. Government, of course, too should draft outlines for future policies. Attention drawn by social pressure groups to the specific problem of male battering of women, however, is necessary to force an adequate approach to this serious social problem.

Besides legal protection of victims of wife abuse via specific criminal law procedures, this protection may also be enhanced by reinforcing the victim's position as the injured party to a case and as a witness in the legal procedures. The victim of male abuse should be allowed to present her wishes as regards the criminal procedure in her case because this procedure has an immediate impact on her personal circumstances due to the relational context of the matter. The victim's influence on procedure should not reach too far: exercising control over matters of prosecution or sentencing is not desirable. Not only because this would undermine the arbitration function of criminal law, but also because it would increase the woman's dependency as regards her partner or ex-partner. Furthermore, it would push male battering of women as a social issue to the background. These arguments also plead against treating wife abuse as an offence prosecutable only on complaint; male battering of women would then be reduced to a private problem. Now that the position of injured parties has been improved by the directives on victims of crime and the Terwee Act, a further strengthening of the legal position of victims

of domestic violence as injured parties seems superfluous, although a number of refinements might be added to the current regulation.

The position of victims of wife abuse as witnesses should be reinforced by recognizing their right to speak within the context of fact finding and to include in the law a right to 'fair hearing'. It is furthermore important that the right to physical integrity and privacy of victim-witnesses should be acknowledged by codification thereof in statutes: if it is reasonably to be expected that the physical or mental health of the victim will be endangered in case she testifies in public, the court can decide not to call her. The possibility for the witness to commence action which allows her to appeal against being called to testify, entails recognition of the witness as a legal subject instead of a legal object within the criminal procedure. Finally, a right to legal aid is of importance in order to ensure proper legal and emotional support for victim-witnesses and victims as injured parties.

Legal protection can, finally, also consist of the way in which offences are formulated and interpreted. A statutory clause expresses an evaluation of the essence of interests involved. An offence which is effective towards the addressee and which offers a point of reference to whoever has to interpret the law, has symbolic value. Symbolic value is lacking if the issue the act claims to regulate is no part of the legal debate. One might say that although domestic violence is an issue the Criminal Code claims to regulate, the various offences which could cover male domestic violence against women have no symbolic value because domestic violence is hardly an issue in the legal debate. In order to enhance the symbolic value and thus also the legal protection of victims of domestic violence a separate title 'Domestic Violence' should be incorporated in the Criminal Code. By specifically criminalizing relational violence the facts related to this violence can no longer be cast aside as incidental case aspects, but have to be discussed as relevant facts in the legal debate. The interest to be protected, personal freedom within the privacy of a relationship, will be clearly codified. This would form a substantial improvement of the legal protection provided for victims of violence by their partners or ex-partners. To increase the chance of the act having symbolic value instead of being merely a symbolic act, its introduction will have to be accompanied by a whole set of measures. Without adequate practical measures the statutory change will at best only have ideological meaning or the intended results will not be achieved, thus failing to bring improved legal protection.